JD(SF)–06-06
Kansas City, MO

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

TNT LOGISTICS NORTH AMERICA, INC.
and ADSERV TEAM, INC., Joint Employers

and

Cases 17-CA-22918
17-CA-22990
17-CA-23049
17-CA-23070
17-CA-23172

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 41, AFL-CIO

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Stanley E. Craven, Esq., and Neal C. Geddes, Esq., of Spencer, Fane, Britt & Brown, LLP, Overland Park, KS, for Respondent TNT.

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Overland Park, Kansas on July 19, 20, 21, 22, 25, 26, 27, and 28, and August 8, 9, and 10, 2005. The initial charge in Case 17-CA-22918 was filed on October 7, 2004 by International Brotherhood of Teamsters, Local Union No. 41, AFL-CIO (Union). Thereafter the Union filed various additional charges as specified in the above caption. On June 24, 2005, the Regional Director for Region 17 of the National Labor Relations Board (Board) issued an Order Consolidating Cases, consolidated Complaint and Notice of Hearing alleging violations by TNT Logistics North America), Inc. (TNT), and Adserv Team, Inc, (Adserv), Joint Employers, of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (Act). Thereafter, on July 15, 2005, the Regional Director issued an Order Further Consolidating Cases, and Second Consolidated Complaint and Notice of Hearing. Respondent Adserv did not file an answer to either complaint. Respondent TNT, in its answers to the complaints, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel), counsel for the Respondent, and counsel for the Union.

Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

Respondent TNT is a Delaware corporation, with its principal corporate office located in Jacksonville, Florida, and is engaged in providing warehousing and interstate transportation and distribution services to numerous manufacturing and transportation organizations throughout the United States. In the course and conduct of its business operations it receives gross revenues in excess of $50,000 annually for the transportation of freight in interstate commerce as the operator of Norfolk and Southern Railroad's mixing yard operations located in Kansas City, Missouri.

Respondent Adserv is a corporation with corporate offices located in Fairborne, Ohio and Las Vegas, Nevada, and is engaged in the business of providing temporary personnel to business enterprises. At times material herein, Adserv maintained a field office at the mixing center in Kansas City, Missouri, where it has been engaged in a contractual relationship to supply temporary personnel to Respondent TNT at the mixing center. During times material herein Adserv performed services valued in excess of $50,000 for Respondent TNT at the mixing center.

It is admitted and I find that Respondent TNT is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Based upon the foregoing, I find that Respondent Adserv is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Further, I find that Respondent TNT and Respondent Adserv are joint employers as alleged in the complaints.

II. The Labor Organization Involved

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Issues

A principal issue in this proceeding is whether Respondent TNT, as a successor employer, violated Section 8(a)(5) of the Act by unilaterally instituting certain initial terms and conditions of employment. Additional issues are whether Respondent Adserv and/or Respondent TNT engaged in other violations of Section 8(a)(1), (3) and (5) of the Act.

B. The Attendance Policy

1. Background Facts

Since at least 1996 the Norfolk Southern Railroad has contracted with various employers to operate its rail yard property known as the Kansas City Voltz Mixing Center. The mixing center is a multi-acre property where incoming automobiles and trucks are received by rail or truck from the manufacturer and are inventoried, moved to staging areas, and then loaded on railcars or trucks according to instructions designating the mix and destination of particular vehicles. These vehicles are then shipped to various destinations throughout North America. The mixing yard operations are continuous, seven days a week, twenty-four hours a day.

Since 1997 the Union has been the collective bargaining representative of five successive employers who have operated the mixing center, including TNT, the current operator of the mixing center. The Union organized the employees of the first of these employers, and entered into an initial collective bargaining agreement with the second employer. Thereafter each successive employer, other than TNT, has adopted the collective bargaining agreement of its predecessor. Immediately prior to TNT's tenure, an entity known as Caliber KC Mixing Center, Inc (Caliber) was operating the mixing center. A collective bargaining agreement between the Union and Caliber extended from January 21, 2002 through January 20, 2005. During that contract term Norfolk Southern Railroad decided to cancel its contract with Caliber, and In May, 2004[1] awarded the mixing center contract to TNT; July 3 was set as the transition date TNT was to replace Caliber and continue operations without interruption of the above-described mixing yard operations.

Initial discussions between the Union and TNT took place at a meeting on May 6. John D. Webb, Director of Labor and Employee Relations, represented TNT. Business Agent Vic Terranella represented the Union. Terranella testified that at this meeting Webb advised Terranella that TNT did not intend to adopt the Caliber collective bargaining agreement. It was agreed that negotiations for a new collective bargaining agreement between the Union and TNT should begin from "scratch." Webb stated that TNT needed to have a contract in place by July 3, the date TNT was to take over the operations from Caliber.

By letter dated May 11, Webb, wrote Terranella, as follows:

> This will confirm the substance of our discussions regarding initial terms and conditions of employment for hourly employees hired by TNT Logistics in the newly awarded Kansas City Automobile Mixing Center.
>
> It is my understanding that the current hourly employees of the existing employer are represented by Teamsters Local 41 (the "Union") under a subsisting collective bargaining agreement between the Union and the existing employer. TNT Logistics will consider all of those existing hourly employees, who apply, for positions with TNT subject to TNT's standard hiring criteria.[2] However, terms and conditions of employment for those individuals who meet TNT's standard hiring criteria and ultimately become TNT employees will be set by TNT and TNT will not maintain all of the terms and conditions of the prior employer. TNT

[1] All dates or time periods hereinafter are within 2004 unless otherwise noted.
[2] TNT is a large, nationwide company with an established, uniform hiring criteria policy.

intends to negotiate with the Union towards a new collective agreement covering the TNT hourly employees ultimately hired by TNT, if the Union ultimately ends up representing a majority of the TNT workforce.

I look forward to working with you as we move forward with this project. Should you have any questions, please feel free to contact me.

Another meeting took place on May 28. At that time Webb told Terranella that he believed every current Caliber employee would be hired by TNT except for those individuals who did not pass the drug test. Webb, according to Terranella, also said TNT required prospective employees to take a personality test, called a "hire for success test," but stated that this test would not be utilized as a hiring criteria.

The parties met on various dates in June. Comprehensive proposals concerning the terms and conditions of employment for the mixing center employees were exchanged and discussed. However, no agreement was reached prior to July 3. During one of these June meetings, according to Terranella, TNT represented that it anticipated needing a total employee complement of 133 employees.[3] Meetings were held on June 18, 21 and 22. At one of these meetings TNT handed the Union a multi-page document listing 158 Caliber employees who had applied for various positions with TNT. The document itemized the results of TNT's screening process for each individual, and noted whether the individual was eligible for hire. According to this list, TNT intended to hire 71 Caliber applicants but did not intend to hire some 85 Caliber applicants who, for various reasons, did not qualify under its screening process. The Union was advised that TNT intended to obtain the remainder of its workforce through an employment service that would interview and hire employees on a temporary basis; these employees would serve a 90-day probationary period as employees of the employment service and would be converted over to permanent TNT employees at the end of the probationary period. This employment service turned out to be Respondent Adserv.

At the bargaining meeting on June 18, TNT proposed that the contract include a detailed, four-page, point-based attendance policy [4] that was in effect at other TNT facilities.[5] This policy, in essence, was designed to insure that employees would be sensitive to TNT's need for efficiency and productivity. It contained a point system for different attendance situations, including tardiness and absences, and included a five-step progressive disciplinary process, each step based on the number of points accumulated by an employee on a no-fault basis.[6] Thus, for example, an employee could "point out," or be disciplined or discharged even

[3] Although Caliber employed about 160 employees, TNT apparently believed it could operate the facility with fewer employees.

[4] Terranella testified that Caliber also had a no-fault attendance policy, but the record does not show the differences between the two policies.

[5] It appears that TNT applied this attendance policy on a nationwide basis for its hourly employees unless modified or superceded by collective bargaining agreements.

[6] The no-fault five-step disciplinary scheme provides for (1) Verbal Counseling, (2) Written Warning, (3) Written Warning plus one day suspension without pay, (4) Written Warning plus three days suspension without pay, and (5) Termination.

for excused absences. [7] Conversely, an employee could accrue points for good attendance, that would be used to offset subsequent attendance deficiencies. This attendance policy, with its no-fault progressive disciplinary scheme, was separate from and in addition to the just-cause "Discharge and Suspension" provision TNT proposed for other than attendance-related matters.

Terranella testified that the Union's negotiating team questioned Webb at length regarding how the attendance system would be administered and the recourse employees would have upon receiving discipline under the no-fault policy. After considerable discussion, Terranella said that the Union had a counterproposal to the Respondent's attendance policy proposal. At this point, Webb, who was becoming frustrated with the length of time given to discussion of this issue, abruptly said he was taking the proposal off the table and that the parties could "get back together as far as discussing another attendance policy" at a later point. However, the issue was never raised again prior to July 3. [8]

On June 29, under the heading "TNT Logistics North America, Inc.'s Last and Final Monetary and Non-Monetary Proposal," TNT submitted to the Union a comprehensive collective bargaining agreement covering the period July 3, 2004 through July 2, 2007. This proposal did not include any attendance policy.

On July 1, the Union conducted a ratification vote and the proposed contract was overwhelmingly rejected. Terranella advised Webb of the results of the vote, and Webb stated that beginning July 3, the employees would be going to work under the terms of TNT's June 29 "last best final offer."

Seventy-one former Caliber employees began working for TNT on July 3, or their first assigned shift thereafter. The Union believed that the employees would commence working under the terms and conditions set forth in TNT's final offer. Prior to commencing work each employee, with apparently some isolated exceptions, was required to attend an orientation presentation consisting of some 90 pages of information presented on a TV monitor.[9] This information included TNT's history, its various employee policies, and other matters. According to TNT, eight pages of the presentation concerned the aforementioned no-fault attendance policy; in addition, according to TNT, the attendance policy was posted on an employee bulletin board on July 3, and remained on the bulletin board thereafter. The General Counsel and Union contend, *infra*, that the orientation presentation did not include an attendance policy, and that no such policy was posted prior to July 13, on which date the first employee was terminated pursuant to the attendance policy.

On July 12, the parties signed an "Agreement for Voluntary Recognition" whereby TNT acknowledged that a majority of its current mixing center employees had previously been

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[7] However, fewer points were given for excused absences than for unexcused absences.
[8] There is no contention that the parties bargained to impasse over this proposal before it was taken off the table by the Respondent.
[9] It appears that virtually all the employees were given this orientation presentation after being hired but prior to their first day of actual work, although some employees may simply have not been available and may have missed the orientation.

represented by the Union; that the Union had requested recognition as the majority representative of the employees; that TNT agreed that a majority of its bargaining unit employees were represented by the Union; and that the Union was recognized as the exclusive collective bargaining representative of its unit employees.

Terranella testified that this July 12 recognition agreement was entered into as a mere formality and was not intended to establish the date of July 12 as the official date of recognition; rather, the parties had tacitly agreed that the Union's majority representative status had previously been established and the Respondent had previously acknowledged its bargaining obligation. Terranella's testimony stands unrebutted.

By letter dated August 7, TNT outlined the relationship of the parties to that point, *inter alia* as follows:

> Over the past number of weeks, TNT Logistics North America, Inc (TNT) and Teamsters Local 41 ("the Union") have engaged in collective bargaining with the purported goal of obtaining a collective bargaining agreement for TNT's hourly employees represented by the Union at TNT's vehicle mixing center in Kansas City, Mo. The negotiations were conducted pursuant to voluntary recognition by TNT of the Union's representative status occasioned by the hiring by TNT of seventy-one (71) Teamster-represented employees of the prior employer.

Terranella testified that on July 13, he received a phone call from a bargaining unit employee, Steve New. New said he had been discharged that day because he had "pointed out" under the attendance policy. Terranella phoned Todd Cox, mixing yard project manager, about the matter, and Cox confirmed that New had pointed out under the attendance policy. Terranella asked him, "What attendance policy?" and reminded him that TNT had taken that proposal off the table during the course of bargaining, Cox, according to Terranella, said, "Well, we implemented it anyway," and went on to say that the policy had been posted on the bulletin board.

Sharon Smith worked in the payroll department for Caliber, and was hired as payroll manager by TNT to work in payroll and human resources. Smith testified that prior to July 3, TNT conducted multiple orientation sessions at various locations for different groups of employees who had been hired by TNT and who would be commencing work on or after July 3. Smith testified that upon becoming an employee of TNT, she too attended an orientation session, and was shown a series of some 90 pages on a TV screen setting out the history and various policies of TNT, including the attendance policy; moreover, she received a written copy

of the attendance policy during her orientation.[10] Smith testified that she had been instructed to post the attendance policy, and that on July 3, "the second thing I did for TNT, was put the Attendance Policy downstairs, on the first floor." According to Smith, this policy remained continuously posted at all times since July 3. On occasion, however, unknown persons would remove the policy and Smith would sometimes find it on a table in the lunchroom. Smith would re-post it and, according to Smith, "after a while, it stayed posted."

Mark Cowens, Assistant Contract Manager for TNT, testified that each of the newly hired employees was given the same information about the attendance policy regardless of which orientation session the employee attended, and that the policy was posted from "day one." When he noticed that the policy had been removed from the bulletin board, he would ask Smith to post it again. He overheard a number of employees expressing their opinion that the TNT policy was too strict compared with Caliber's attendance policy that was an "occurrence" policy and very much different from the policy implemented by TNT.

Some of the General Counsel witnesses were emphatic that during their orientation session they were not advised of an attendance policy, and others were uncertain regarding what happened during their orientation because of the approximately one-year lapse of time between July 3 and the date they testified in this proceeding. Others vaguely recalled that an attendance policy was included in the orientation materials, but were unable to supply any details. One witness, John Pritchett, a union steward, recalled that Caliber had a progressive disciplinary attendance policy, but did not know what TNT's attendance policy was until a couple of weeks after July 3. Another witness, Jacqueline Mayes, who began working on July 3, testified both that Caliber had a point-based attendance policy and also that the information presented during her TNT orientation session included information regarding this policy. Another witness, Heather Ingram, who was initially hired by Adserv but, insofar as the record shows was given the same TNT orientation presentation as regular TNT employees,[11] clearly recalled that the presentation included a no-fault, point-based, attendance control plan that was to be effective on July 3, her first day of employment. She further testified that "points was a big deal." Employee Laura Barksdale recalled that she and her group were told about the point-based attendance policy during her orientation on or before July 3.

The amended complaint alleges that the following 11 employees were discharged under the attendance policy: Josh Ballinger, Laura Barksdale, Steve New, Douglas Dagly, Jackie Jenkins, Steve Murray, Denise Rodenberg, Bernard Schmitz, Travis Schwab, Chad Stark, and Bruce Yorkovich.

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[10] Apparently because of the rather hectic start-up problems confronting TNT, it appears that employees, with the exception of Smith and perhaps other employees in her orientation session, were neither given a copy of the attendance policy or required to read it or to sign an acknowledgment form; thus, no such forms appear in personnel files subpoenaed by the General Counsel.

[11] According to Terranella, Adserv employees were subject to the same contractual provisions as TNT employees.

2. Analysis and Conclusions

I find that the General Counsel has failed to demonstrate by convincing evidence that the attendance policy was implemented on July 13, as alleged in the complaint. I credit Smith's testimony that she was advised of the attendance policy and given a copy of the policy during her orientation, that she posted it on July 3 pursuant to instructions of her superior, and that it remained posted on and after July 3. Her testimony was not only clear and convincing, but was consistent with the testimony of several of General Counsel's witnesses who definitively recalled that such an attendance policy was presented during their orientation prior to July 3. Accordingly, I find that the attendance policy was implemented and posted on the bulletin board on July 3, and not, as alleged in the complaint, on July 13. [12]

General Counsel and the Union maintain that even if the attendance policy was implemented on July 3, TNT was precluded from unilaterally establishing initial terms and conditions of employment on that date. Thus, it is argued that TNT's May 11 letter reserving the right to set initial terms and conditions of employment was not sufficiently specific and/or was superceded by its June 21 statement that it intended to hire 71 union-represented Caliber employees and operate its facility with a total employee complement of 133 employees; at that point the Union, as the nominal majority representative of TNT's employees, became a "perfectly clear" successor under the authority of *Burns Security Service*, 406 U.S. 272 (1972), and could no longer unilaterally establish initial terms and conditions of employment. Alternatively, it is argued that TNT in effect waived its right to unilaterally establish initial terms and conditions of employment by voluntarily engaging in contract negotiations with the Union. Consequently, according to the General Counsel and Union, under either theory, the attendance policy implemented on July 3, amounted to a new, unilaterally implemented term and condition of employment.

TNT relies upon the plain meaning and import of its aforementioned May 11 letter, giving the Union, and therefore the employees,[13] an explicit notice designed to comply with the Board's decision in *Spruce Up Corp.,* 209 NLRB 194 (1974), enf. 529 F.2d 516 (4th Cir. 1975). Thus, TNT stated as follows:

> [T]erms and conditions of employment for those individuals who meet TNT's standard hiring criteria and ultimately become TNT employees will be set by TNT and TNT will not maintain all of the terms and conditions of the prior employer.

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[12] I find that TNT's statement in an attachment to its March 23, 2005 letter to the Regional Office verifying that "In order to comply with the decision by the NLRB Regional Office," TNT was, *inter alia*, "rescinding the attendance policy *announced on July 13, 2004*," does not constitute an admission that the policy was in fact announced on July 13. Thus, In its answer to the complaint TNT denied that it had unilaterally implemented an attendance policy on or about July 13. However, in its March 23, 2005 letter, TNT referenced this complaint allegation in order to reach an accommodation with the Regional Office so that the Regional Office would refrain from seeking injunctive relief, but TNT also reserved the right to litigate "its allegedly improperly implemented unilateral actions" before an administrative law judge. (Emphasis supplied.)

[13] *Elf Autochem North America, Inc.*, 339 NLRB 796, fn. 3.

In this manner, according to TNT, it did "clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment," as required by *Spruce Up*.[14] Accordingly, it was not a "perfectly clear" *Burns* successor, and was therefore entitled to unilaterally establish initial terms and conditions of employment which it did on July 3, after failing to reach agreement with the Union prior to the July 3 start-up date. [15]

The following Board cases relied upon by the General Counsel and the Union [16] are distinguishable in that the successor employers in these cases did not comply with the foregoing *Spruce Up* criteria. Thus, the announcements by the successor employers in the cited cases do not contain either a *clear* statement of intent to establish new terms and conditions of employment, and/or the announcements were untimely, coming *after*, rather than *prior to,* an express intent to hire a majority of its employees from the predecessor's union-represented employees:

Spitzer Akron, Inc., 219 NLRB 20, 22 (1975), (Violation found when successor hired predecessor's workforce or expressed intent to hire predecessor's workforce prior to the announcement of changes); *C.M.E., Inc*. 225 NLRB 514 (1976), (Violation found when successor hired predecessor's workforce or expressed intent to hire predecessor's workforce prior to the announcement of changes)*; Anita Shops, Inc., d/b/a Arden's,* 211 NLRB 501 (1974), (No violation found when successor made simultaneous statements in letter to union that successor intended to hire workforce of predecessor *and* intended to place into effect its own terms and conditions of employment pending negotiations with the union.); *Starco Farmer's Market*, 237 NLRB 373 (1978), (Violation found when successor hired predecessor's workforce or expressed intent to hire predecessor's workforce prior to the announcement of changes); *Helnick Corp.,* 301 NLRB 128 (1991), (Violation found when successor hired predecessor's workforce or expressed intent to hire predecessor's workforce prior to the announcement of changes); *Prime Service, Inc.*, 330 NLRB 815 (2000), (Violation found when successor hired predecessor's workforce or expressed intent to hire predecessor's workforce prior to the announcement of changes and thereafter refused to bargain with union); *Canteen Co.,* 317 NLRB 1052 (1995), (Violation found when successor hired predecessor's workforce or expressed intent to hire predecessor's workforce prior to the announcement of changes not previously agreed to by union)*; Elf Autochem North America*, 339 NLRB 796 (2003), (Violation found when successor hired predecessor's workforce or expressed intent to hire predecessor's workforce prior to the announcement of changes; prior statement to employees that they would receive "equivalent salaries and comparable benefits" deemed generalized and speculative and not sufficiently clear that successor intended to establish new terms and conditions of employment); *Hilton Environmental*, 320 NLRB 437 (1995), (; *East Belden Corp*, 239 NLRB 776, 793 (1978), (Violation found when successor hired predecessor's workforce or expressed intent to hire predecessor's workforce prior to the announcement of changes; prior statement that successor intended to make unspecified changes sometime in the future and did so some two

[14] *Spruce Up*, p. 195.
[15] Further, Project Manager Cox testified that TNT believed it had a right to maintain an attendance policy with or without the Union's agreement and, in addition, that the management rights clause contained in the "last best final" offer gave it the right to maintain such a policy.
[16] I am omitting reference to cited ALJ decisions as being of no precedential value.

months after takeover found not sufficiently clear, generalized and speculative, and, in addition, that prior announcement of post-takeover changes not contemplated under *Burns*).

No case has been cited either by the General Counsel or the Union requiring that a *Spruce Up* announcement must specifically set forth the precise terms or conditions of employment that the successor intends to implement, and the *Spruce Up* language quoted above does not require such a degree of specificity; rather, it appears that the announcement of a clear intent to change unspecified terms or conditions of employment is sufficient to put the predecessor's employees on notice that their current terms and conditions of employment will not carry over to the successor. See *Anita Shops, Inc., d/b/a Arden's, supra.* Accordingly, I conclude the Respondent's May 11 announcement that TNT intended to establish its own terms and conditions of employment and did not intend to maintain all the terms and conditions of the predecessor, complies with the *Spruce Up* criteria for such announcements.

Next, the General Counsel and Union contend TNT relinquished whatever rights it had under *Burns* and *Spruce Up* to unilaterally establish initial terms and conditions of employment under successorship principles, and instead opted to negotiate such matters with the Union. Thus, it is argued the Respondent's May 11 letter, coupled with its June 21 statement of intent to hire a majority of its workforce from Caliber's union-represented employees, constituted voluntary recognition of the Union; that the parties bargained with the expectation that the fixing of initial terms would be worked out and embodied in a contract prior to the July 3 start-up date; and that therefore, on and after June 21, the parties' relationship became subject to and governed by other principles of collective bargaining as if the Respondent was no longer a successor employer but rather an incumbent employer.[17] Under this rationale, according to the General Counsel and Union, the principles established in *Burns* and *Spruce Up,* were no longer applicable to the parties' changed relationship.

The fundamental difficulty with this theory is that the Respondent never relinquished its rights under *Burns and Spruce Up.* The Respondent's May 11 letter advises the Union that it intended to both unilaterally establish initial terms and conditions of employment *and*, in addition, to bargain with the Union in the event the Union became the employees' collective bargaining representative. These two statements are not mutually exclusive. At no point did the Respondent agree that initial terms and conditions of employment would be established only through bargaining. While both parties were hopeful that this would be the case, the Respondent simply made no such commitment and, absent such a commitment, thereby reserved the right to unilaterally set initial terms and conditions of employment in the event that collective bargaining did not culminate in a collective bargaining agreement prior to start-up. The relinquishment of important rights may not be inferred, as the General Counsel and Union contend herein, but must be clear and unequivocal. The Board in *Johnson-Bateman Co*., 295 NLRB 180, 185 (1989), stated in an analogous context:

[17] See *Monterey Newspapers, Inc*., 334 NLRB 1019, 1021 and fn. 11 (2001): "[T]he setting of initial employment terms by a lawful *Burns* successor stands on different footing that decisions made by an incumbent employer."

> Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter. (Footnote omitted.)

See also *Metropolitan Edison Co. v NLRB*, 460 U.S.693 (1983); *Exxon Research & Engineering Co*., 317 NLRB 675 (1995).

Although it appears there is no complaint allegation raising this issue, and neither the Union nor TNT refer to it in their briefs, the General Counsel argues that even if the Respondent's unilateral implementation of the attendance policy was lawful, the Respondent did not thereafter adhere to the policy's progressive discipline component and thereby, in effect, unilaterally changed it to the detriment of the unit employees in violation of Section 8(a)(5) of the Act.[18] In support of this argument the General Counsel relies upon the following stipulation of the parties found in Joint Exhibit No. 3:

> Respondent TNT's personnel records for [employees discharged under the attendance policy] [19] do not contain documentation to support that they received the progression of discipline as set forth in the attendance policy, which is in the record as General Counsel's Exhibit 7.

This stipulation does not state that employees did not receive progressive discipline,[20] and personnel records introduced into the record by the General Counsel for some of the discharged individuals reflect that they did, in fact, receive progressive discipline for attendance infractions.[21] Nor does the Respondent admit that it did not impose progressive discipline; rather, Respondent's counsel simply agreed at the hearing that the personnel records for the named employees and other employees did show "a haphazard, albeit non-discriminatory, application of our policy," Moreover, it appears that many, if not the majority of the named employees, were considered to have quit or to have self-terminated because they did not show

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[18] See *The Daily News of Los Angeles*, 315 NLRB 1236, 1237-38 (1994); *Dorsey Trailers, Inc.*, 327 NLRB 835, 853-4 (1999).

[19] The record does not show how these ten named employees, discharged between July and November, came to be selected for inclusion in the complaint, as the Respondent's records (Respondent's Exhibit 7) reflect that at least 28 employees were discharged for attendance-related reasons during this period of time, and many others were discharged for attendance-related reasons after this period of time.

[20] Indeed, one of the named employees, Steve Murray, a union steward, testified that he did receive "counseling" for alleged attendance infractions.

[21] GC Exhibit 79 reflects that Bruce Yorkovich did receive a written warning and a suspension; GC Exhibit 76 reflects that Chad Stark did receive a verbal warning and a written warning; GC Exhibit 72 reflects that Travis Schwab did receive a written warning; GC Exhibit 58 reflects that a written warning was prepared for Jackie Jenkins, but that he 'left early" and therefore did not receive the warning; GC Exhibits 54 and 51 reflect that Doug Dagley did receive a verbal warning and a 3 day suspension; GC Exhibit 48 reflects that Laura Barksdale did receive a verbal warning.

up to work for several days; accordingly, if their personnel files do not show they received progressive discipline, it may be because they had quit and were no longer present and available to receive progressive discipline.

Accordingly, I conclude that the General Counsel has not established that the Respondent, as a matter of general policy, decided to disregard and ignore the progressive discipline component of the attendance policy and thereby, in effect, unilaterally changed it without notification to the Union to the detriment of unit employees. [22] There is no record evidence demonstrating that the Respondent made a conscious managerial decision to ignore the progressive discipline provisions of its attendance policy. Moreover, as noted, it appears that many named employees were nominally deemed to have been terminated under the attendance policy not because they "pointed out" as a result of incremental attendance infractions, but because by simply not calling in and not showing up for work it was assumed, in accordance with other provisions of the attendance policy, that they had quit. All parties to this proceeding have agreed that the Respondent may impose reasonable attendance requirements as an inherent prerogative of management.[23] Clearly, an employer is merely exercising its managerial prerogative to discharge employees who fail to show up for work, regardless of whether or not that prerogative is spelled out in a formal attendance policy.

On the basis of the foregoing, I find that the employees named in the complaint were not terminated in violation of Section 8(a)(5) of the Act, as alleged.

C. The Strike and its Aftermath

1. Background; Complaint Allegations

The parties' negotiations were unsuccessful. An economic strike began on August 12, and continued until September 26, when it was called off for tactical reasons by the Union, *infra.* Thereupon, the striking employees who returned to work were considered by TNT to be new probationary employees, their seniority was eliminated, and their wages were drastically reduced to the starting wage rate of $11.25 per hour, from the pre-strike range of between $15.95 and $18.75 per hour, depending upon their job description.

[22] While the record shows that the Respondent did make certain minor modifications to the point component of the policy, but not to the progressive discipline component of the policy, without notification to the Union, there is no showing that enforcement of these modifications resulted in the termination of any of the named employees.

[23] Article 39—Management Rights, of the Respondent's "last best final" offer that became, together with the attendance policy, the initial terms and conditions of employment, states, *inter alia*, that the Respondent shall have "the right to hire, suspend, transfer, promote, discharge or discipline for just cause, and to maintain discipline and efficiency of its employees…" and that it shall have "all inherent and common law management functions and prerogatives…" not expressly restricted by the agreement. During bargaining, the parties reached tentative agreement on this proposal.

The complaint alleges that following the strike certain former Caliber employees were not hired or recalled by TNT for discriminatory reasons; that certain recalled employees were constructively discharged; that other recalled or newly hired former Caliber employees were discharged by TNT for discriminatory reasons; and that still others were discharged in violation of Section 8(a)(5) of the Act as a result of TNT's failure to adhere to its progressive disciplinary policy (as distinguished from the progressive attendance policy). These categories of employees are discussed below.

2. Discriminatory refusal to hire former Caliber employees

The complaint alleges that after the strike TNT refused to hire certain former Caliber employees who had applied for employment prior to July 3 but were not initially accepted for employment by TNT prior to the strike. Although these applicants were initially rejected by TNT for various reasons, the Union, during negotiations, continued to request that TNT reconsider its position. Terranella testified that throughout negotiations, both before and during the strike, employment for these applicants was a "priority issue" as the Union was seeking jobs for as many former union-represented Caliber employees as possible.

On August 24, during the strike, Labor Relations Director Webb sent the Union a fax containing the names of striking employees who would be called back to work after the strike, and, in addition, a list of 19 employees under the heading of "Call Backs." The call backs were former Caliber employees who had initially applied for work with TNT but were among those not hired. Included in this list of 19 employees were the names of eight employees, [24] distinguished from the others by a handwritten bracketed notation stating, "[W]illing to hire these people if they desire." Terranella had not had any prior discussion with Webb about these names, and Terranella did not know whether Webb intended to place any conditions on the hiring of these individuals after the strike.[25] Terranella testified, however, that "It was my understanding that,…if we pulled the pickets and go back to work, these are additional people that he [Webb] is willing to call back." Terranella admits he did not know whether Webb was offering to hire these individuals only if the parties immediately reached a contract or, if no contract was reached, whether it was Webb's intention to hire these individuals if the Union immediately ended the strike, or, if the strike was not immediately ended, whether it was Webb's intention to hire the employees regardless of when the strike ended. Terranella simply assumed, however, that there were no preconditions to the hiring of these individuals because TNT needed experienced workers and Webb had explained to Terranella that following the strike TNT's employee complement would need to be larger than originally contemplated.

Indeed, it did not appear that a breakthrough in negotiations was imminent as on August 27 the Union had rejected TNT's modified contract proposal. On September 16, Terranella continued discussions with Webb regarding who would be called to work following the strike, whenever that eventuality might occur. Webb stated that the original group of 71 employees would return, and then specifically said that TNT was willing to hire the aforementioned eight employees in addition to others. Tarranella made a check mark opposite each of these names with the notation, "Company is willing to hire." Terranella testified that at

[24] Jonathan Foster, Mathew Daughtry, Danny Barnes, Timothy Mitchell, Aaron Spring, Greg Steele, Marvin Rowlett, Joseph Griffith.

[25] According to Terranella, it is likely that other union representatives did have such discussions with Webb.

that point no one was optimistic about arriving at a contract and, "[I]t was stipulated, in the conversation, that—that we were trying to see what we can do to pull the picket line, at that time,…and keep on negotiating."

On September 23, Webb advised Terranella that TNT had hired 83 replacement workers and had 20 more employees "in the pipeline" that TNT intended to hire. Webb went on to say that the Union would no longer represent a majority of the employees and would lose the unit if it did not end the strike. On the next day, September 24, there was discussion about the conditions under which the Union would end the strike. Webb stated that he would not displace the replacement workers, and that the strikers would return with no seniority. Then, according to Terranella, he and Webb again went through the list of employees who would be returned to work after the strike, including strikers and those eight former Caliber employees discussed on September 16. Webb, according to Terranella, said that he would be willing to hire the latter individuals if the Union ended the strike. Terranella specifically wanted to know how the additional applicants could be hired since, under the scenario outlined by Webb, there would be more workers than positions available: Thus, Webb indicated that he would retain the replacement employees, recall the strikers, and, in addition, hire the eight applicants for employment. Webb said that the replacement workers were "leaving right and left, either getting fired or bein' (sic) discharged," and that, in effect, this would not be a problem.

Also on September 24 a replacement employee filed a decertification petition in Case 17-RD-1705 on the basis that, "A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative."

As a result of the foregoing circumstances, according to Terranella, the union officials believed that that if the Union did not end the strike and return its members to work there was a distinct possibility that the Union would be decertified. On the evening of September 24, Terranella advised Webb that the Union would end the strike. As noted above, the strike ended on September 26.

The reasons underlying TNT's refusal to hire the aforementioned individuals following the strike was explained by Project Manager Cox. Cox testified that these applicants were originally rejected for employment. Thereafter, during negotiations, the Union requested that they and others be hired, and TNT indicated that it would hire the individuals on the condition that the Union accept TNT's contract proposal. As there was no contract when the Union ended the strike, TNT believed it had no obligation to hire these individuals. TNT does not assert that no positions were available for these employees after the strike. To the contrary, it was stipulated that TNT had sufficient positions available for these employees after September 26.

The problem with Cox's explanation is that on September 24, according to Terranella's unrebutted testimony, Webb reiterated his agreement to hire these individuals on the condition that the Union end the strike, rather than on the condition that the parties reach a collective bargaining agreement. Webb did not testify in this proceeding, and Cox was not involved in the September 24 conversation. Accordingly, I credit the testimony of Terranella and find that on September 24 Webb agreed to hire the named employees on the condition that the Union end the strike. The Union did so two days later.

Throughout this proceeding many witnesses testified that the former Caliber employees, both before and after the strike, were commonly referred to as "vets" or veterans by managers, supervisors and fellow employees, because of their prior experience at the mixing yard; further, they trained the inexperienced Adserv employees. Employee Byron Harmon, a former Caliber employee who participated in the strike and returned to work, testified that on December 24, a

supervisor by the name of Cortez Star related to him that Star had attended a meeting with Cox and other managers, and during the meeting Cox asked, "[W]hy were the Vets still working." Cox, according to Star, went on to say "that they needed to get rid of those…Vets, …pretty much, by any means necessary." Harmon testified that later that evening another supervisor or manager, Dewayne Diggs, "pretty much, confirmed what Cortez Star had told me." Diggs told Harmon that he asked Cox, "[W]hy would I want to get rid of the Vets because they are my best employees."

Neither Star nor Diggs testified in this proceeding. Cox testified at some length, and did not deny that he made the statement attributed to him by Supervisor Star as related to Harmon. Nor did he deny that TNT wanted to get rid of the vets by any means necessary. Harmon appeared to be a credible witness and I credit his unrebutted testimony.

Absent any explanatory testimony or evidence by TNT, the record evidence, including the settlement agreement entered into by the parties during the hearing,[26] makes it abundantly clear that following the strike TNT was no longer anxious to have the strikers return to work. Thus, as a condition of returning to work TNT unilaterally eliminated the strikers' seniority, drastically reduced their wages, and imposed a new probationary period, all in violation of Section 8(a)(5) of the Act. Further, as alleged in the complaint and contained in the notice component of the settlement agreement reached by the parties, TNT has posted a notice stating, inter alia, that it will not "coerce or encourage employees to support a petition to decertify the Union," and that it will not "inform employees that their unilaterally reduced wages would be restored only after the Union was decertified as their exclusive bargaining representative." Clearly, these factors combined demonstrate a discriminatory motive for TNT's rationale underlying its failure to hire the named veteran applicants for employment after the strike.

Under these circumstances, I conclude the record evidence presented by the General Counsel abundantly supports the complaint allegation that TNT refused to hire the aforementioned individuals for discriminatory reasons in violation of Section 8(a)(3) of the Act. Accordingly, the burden shifts to TNT to establish legitimate business-related and non-discriminatory reasons for its failure to hire these individuals. Having failed to sustain its burden of proof, I find that TNT failed to hire the applicants for discriminatory reasons in violation of Section 8(a)(3) of the Act.[27]

3. Constructive Discharge of Strikers

The facts are not in dispute. As noted, the Union advised TNT that it was ending the strike and that the strikers were available for recall. Because of the decertification petition filed during the strike, the Union requested the strikers to return to work to protect their interests and the interests of the Union. Assistant Contract Manager Cowens phoned the strikers who applied to return to work and advised them of the conditions under which they would be returning, as follows: they would lose the seniority that they had accrued and would not have seniority over the employees who worked during the strike; they would not be given credit for the time they worked prior to the strike but would have to begin a new 90-day probationary period; they would be returned to work at the pay rate of a new employee, namely, $11.25 per hour, despite the fact that prior to the strike they were making between $15.95 and $18.75 per

[26] The settlement agreement does not contain a non-admission clause

[27] The General Counsel's brief notes that the name of Joseph Griffith is being withdrawn as a discriminatee, and therefore his name is not included in the remedy portion of this decision.

hour; and employees in the classification of loader/unloader, who worked an 8 hour shift prior to the strike, would be required to work a 12 hour shift.

Terranella learned from union members that they were being recalled to work under the foregoing conditions. He contacted Cox and Webb. Webb at first assured him that the strikers would be returned at their pre-strike wages, but Webb apparently changed his mind and Terranella was unsuccessful in getting Webb to honor this commitment. A negotiating meeting was held on October 5. During the meeting Cox presented Terranella with a decertification petition, and Webb commented that he did not know whether negotiations could continue because the Union no longer had majority representation as there were 83 replacement employees and 50 strikers who had had accepted TNT's offer to return to work. The subject of wages was raised. Terranella stated that he had been assured that the pre-strike wages of the returning strikers would be restored. Webb replied, according to Terranella, "We cannot pay the returning to work strikers more than the replacement workers…we can't afford it." Then, referring to the monetary offer contained in TNT's initial terms and conditions of employment, Webb stated, "That offer is off the table. We'll have to withdraw that offer." Webb said that the returning workers would be paid at $11.25 per hour, approximately 70 percent of their pre-strike wages.

The foregoing conditions imposed on the returning strikers were alleged in the complaint as discriminatorily motivated in violation of Section 8(a)(3) of the Act, and, in addition, as unlawful unilateral changes in violation of Section 8(a)(5) of the Act. As noted, the parties entered into a Partial Settlement Agreement providing, inter *alia*, that TNT will not unilaterally alter employees' working conditions by reducing their wage rates, eliminating their seniority, and instituting a 90-day probationary period. Further, the agreement provides that TNT will make whole all the returning strikers for wages they lost "because of our discriminatory reduction in wages…"

The complaint alleges that 24 individuals were constructively discharged as a result of the discriminatory and unilateral conditions imposed upon them following the strike. The parties have settled the alleged constructive discharges of 8 of the employees, and four others have been withdrawn from the complaint. The 12 remaining employees[28] fall into three categories: those who refused to return to work due to the unlawful conditions, those who returned and later quit due to the unlawful conditions, and those who returned and, because of the unlawful conditions, decided that it would be more advantageous to "point out" under the attendance policy rather than simply quit, so that they could collect unemployment compensation.

As noted, TNT has entered into a settlement agreement that does not contain a non-admission clause. The settlement agreement provides, inter *alia*, that returning strikers were subjected to a "discriminatory reduction in wages." Clearly this reduction in wages of at least 30 percent for each of the strikers was imposed because the employees participated in a strike against TNT, and for no other reason. When they were hired by TNT they received 30 percent more than new Adserv employees, and had they not participated in the strike this significant wage disparity would have continued. Moreover, TNT did not make a proposal to reduce wages until after it unlawfully sought to decertify the Union, thus indicating that the reduction in wages was specifically calculated to cause employees to decline recall to work, rather than because, as Webb stated to the Union, TNT could not afford to pay the returning strikers more than the replacement workers. Indeed, according to Terranella, at a bargaining session on August 21,

[28] Josh Ballinger, Robert Barksdale, Tony Essig, Harry Goodloe, Ken Hulett, Jennifer Calvert, Linda Fisher, Ryan Fisher, Suni Frese, Carlo Lopez, Jacqueline Mayes, Sean Scott.

Webb stated that if the strike "was pulled" the strikers would be coming back to work as incumbents under the full wages of TNT's pre-strike last best final offer. The Respondent has simply offered no evidence to support any rationale whatsoever for reducing wages or, in addition, for the elimination of seniority and the imposition of a new 90-day probationary period.

Accordingly I find that TNT brought about the very result that it intended, namely, that strikers would decline an offer to return to work or would quit thereafter. Nor is it significant that a large number of strikers who returned to work did not quit, as each individual's circumstances are dependent upon a variety of economic and other factors. Further, the Union strongly suggested to its members that that they return to work. Thus, as Terranella testified:

> We stressed to our employees even though they was not very happy, we stressed to our employees very strong that we needed to go back into work because it's better for us to fight the decert petition inside than outside because right now as we mentioned to them that…that deck has been stacked against us.

Further, the strikers were told by Terranella that they would be returning to work under their original terms and conditions of employment, as this is what Terranella understood from discussions with Webb. When the strikers learned that their pre-strike wages and other conditions of employment would be drastically changed if they returned to work, Terranella continued to assure them that the wage reduction and other changes in their terms and conditions of employment would be satisfactorily resolved in within a short time. When these matters were in fact not resolved, it is perfectly understandable that the strikers' frustration with the unlawful conditions under which they were recalled to work caused them to reconsider their acceptance of employment and to place their own interests over those of the Union.

TNT argues in its brief that, in particular, those employees who decided to point out under the attendance policy, anticipating that a discharge would put them in a better position to collect unemployment, were "engaged in the unprotected activity of intentionally engaging in misconduct which injured the employer's operations," and should be considered to have been lawfully terminated rather than constructively discharged. I do not agree. These individuals were admittedly attempting to work the system to their advantage, and may have caused TNT some additional daily scheduling difficulties. However, there is no evidence that their absence from work amounted to "misconduct" or "injured" TNT's operations, and TNT has cited no case authority in support of its argument.

Having put each of the 12 employees in the untenable position of having to work under the new regimen of unlawfully imposed conditions, including a wage reduction of at least 30 percent, with the expectation that employees would not want to return to work under such conditions, I conclude that TNT is in no position to dictate that the employees should quit in a manner most convenient for TNT. Accordingly, I conclude that each of the 12 employees who quit as a direct result of such unlawfully imposed conditions was constructively discharged by TNT in violation of Section 8(a)(3) of the Act as alleged. *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976); *Consec Security*, 325 NLRB 453 (1998), enfd. Mem. 185 F.3d 862 (3rd Cir. 1999).

4. Run-through switches and derailments; Section 8(a)(3) and (5) allegations

Included within the bargaining unit are rail crew employees who operate engines to move rail cars within the mixing yard. A rail crew customarily consists of an engineer, a conductor and a utility person.[29] These three individuals work as a team, and insofar as the record shows an engine or train may not be operated without a full three-member crew.

The complaint alleges that after the strike four rail crew employees were discharged for "blowing" or running switches: David Dean Barrett, Jeffrey Williams, M. Shane White and Roger Lara. The complaint alleges that these employees were discriminatorily discharged in violation of Section 8(a)(3) of the Act because of TNT's post-strike animus against strikers and veteran former Caliber employees. Additionally, it is alleged that these employees were discharged in violation of Section 8(a)(5) of the Act as a result of TNT's failure to adhere to its progressive disciplinary policy.

Mark Cowens, TNT's Assistant Contract Manager, testified that when TNT took over it was decided that rail crew employees were subject to immediate discipline including discharge for running switches or derailing trains, as these are serious, costly, and potentially dangerous errors for rail crew members to make. Running a switch occurs when a train passes through a switch that is aligned against the direction of the train or does not line up with the rail, resulting in a gap between the rail and the switch point. Running a switch may result at the least in delay and expense for the repair of the switch, and possibly in a derailment if the train comes off the rails due to a misaligned switch. Each instance of a run-through switch or derailment is immediately investigated, and the work of the rail crew members is suspended while each individual completes an accident report of the incident and takes a drug test. Cowens assesses each situation by reviewing the investigation reports, determines the fault or degree of negligence of each crew member based on his experience and judgement of what most likely occurred, and decides whether any given crew member should be disciplined or discharged. As noted above, because running switches and causing derailments is considered to be a serious infraction, the progressive discipline component of TNT's disciplinary procedure embodied in its initial terms and conditions of employment is not applied to such infractions.

Derailments are rare and the record evidence indicates that incidents of run-through switches may be fairly described as relatively infrequent for experienced rail crew members. For example, after TNT took over on July 3, there were two occurrences prior to the strike, one on August 5 (one crew member terminated for first offense), and one on August 7 (no crew members terminated as they were on break and could not have known that a switch had been thrown in their absence before they returned to work).

Cowens testified that during the strike there were two derailments and "a lot" of switches were run, because only inexperienced employees were available to run the trains. During that period no employees were discharged because of their inexperience. Cowens testified as follows regarding the situation during the strike:

[29] However during an interim period TNT assigned a fourth person to act as a lookout on the front of the engine.

> I mean, we were on strike mode. It was kind of, if you will, anything goes, whatever it takes, to get the job done. I mean we had management out, in the yard. We had brand new folks. I mean, these guys were, you know—as soon as we would get them hired and—and through the screening process, they were out, in the yard.

TNT's July 3 initial terms and conditions of employment contains Article 21-Discharge and Suspension. This article provides, inter *alia*, "The Employer may discipline, discharge or suspend any employee only for just cause and agrees to utilize the concept of progressive discipline (i.e., written warning, suspension, termination)…" with certain specified exceptions. The exceptions do no include switch-running infractions. Thus, it is clear, and I find, that TNT intended the progressive disciplinary procedure of this article to apply to switch running incidents.

Cowens was asked whether run-through switches or derailments were intended to be covered by the foregoing progressive discipline policy, and Cowens indicated that this was the case "initially… but they would happen, on such a frequent basis, that our customer [Norfolk and Southern Railroad] came to us and said…Enough is enough and, at that point…we had to start terminating people," because TNT was concerned that Norfolk and Southern Railroad would cancel the contract. Therefore, at that point, in order to satisfy its customer, TNT assigned a fourth person to the rail crew to act as a lookout on the front of the engine, and, in addition, "terminated anyone found responsible for running a switch."

Indeed, on October 15, following the strike, Cowens issued a memorandum to the rail crew entitled "Switching Procedure," setting forth certain requirements with the admonition, "Failure to follow this procedure will result in a written discipline including possible termination." This portion of the memorandum, in effect, constituted a written modification of Article 21-Discharge and Suspension insofar as the rail crew was concerned. And following the memorandum, rail crew employees who were deemed to be responsible for run-through switches were summarily terminated pursuant to this no-tolerance policy. Accordingly, it is clear that TNT, without bargaining with the Union, simply decided to forego its progressive discipline policy for rail crew workers and instead began to immediately terminate employees for running switches in an effort to satisfy its customer and apparently to reduce the incidence of such occurrences.

Barrett, Williams, White and Lara worked on the rail crew either as engineers, conductors or utility persons. Each of these employees testified at length regarding the incident in which he was involved.[30] Each testified that he was a former Caliber employee and returning

[30] The circumstances surrounding the incidents are complex given the fact that customarily three members of the rail crew share responsibility for what has happened, and there seems to be a degree of perhaps subjective comparative culpability for each incident depending on a number of variables, as perceived by the managers who investigate the incident. The named employees testified that their degree of culpability, if any, did not justify their termination.

striker, with significant prior experience on the rail crew, and that prior to his termination he had neither been involved in any previous switch-running incidents with TNT,[31] nor had he received any discipline for being involved in any such incidents while working for TNT.

From September 26, the date the strike ended, through June 30, 2005,[32] there have been a total of 13 run-through switch incidents, on the following dates: October 15 (one striker and one non-striker terminated); October 28 (one non-striker terminated); October 30 (one striker and one non-striker terminated); November 9 (one non-striker terminated); November 14 (one non-striker terminated); January 5, 2005 (no one terminated as negligence could not be assessed due to icy weather conditions that made it impossible to ascertain whether employee were responsible for misaligned switch); January 31, 2005 (one non-striker terminated); April 2, 2005 (one striker and one non-striker in training to be a supervisor terminated); May 28, 2005 (one non-striker terminated); June 13, 2005 (one striker terminated); June 17, 2005 (one non-striker terminated); June 23, 2005 (no employees terminated, two members of management disciplined); and June 30, 2005 (one non-striker terminated).

A total of 14 employees, four strikers and 10 non-strikers were terminated by TNT as a result of their involvement in the foregoing incidents. As noted, the complaint alleges that the four strikers were terminated in violation of Section 8(a)(3) of the Act because they were former Caliber employees and participated in the strike. David Dean Barrett was terminated for the October 15 incident; Jeffrey Williams was terminated for the October 30 incident; Michael Shane White was terminated for the April 2, 2005 incident: and Roger Lara was terminated for the June 13, 2005 incident. The complaint also alleges that the four named individuals were discharged in violation of Section 8(a)(5) of the Act; thus it is contended that TNT unilaterally changed its initial terms and conditions of employment by summarily discharging these employees without giving them the benefit of the progressive discipline policy.

Each of the named employees testified in this proceeding, and in substantial detail recounted the incident for which he was discharged. Each believed that he should not have been discharged under the circumstances. Further, the employees seem to be particularly concerned that TNT's method of dealing with such incidents was unfair; thus, since every crew member on every rail crew will at one time or another be at fault in running through a switch, summary discharge is simply too severe a punishment and is contrary to the more lenient disciplinary policies of Caliber, TNT's predecessor.

Cowens also discussed each situation in detail on a case-by-case basis, and presented his reasons for assessing negligence. It appears that to a great extent the assessment of fault is discretionary and intuitive and based upon a good deal of experience with mixing yard rail operations.

[31] Lara was not specifically asked whether he had been involved in any prior switch running incidents while working for TNT but his testimony clearly indicates that he had not.

[32] Between June 30, 2005 and August 9, 2005, the date Cowens testified in this proceeding, there was one run-through switch, which apparently occurred shortly prior to August 9, 2005. The record contains no details of this incident.

Cowens testified as follows regarding the October 15 incident involving David Dean Barrett: Barrett was the utility person, and the conductor was Curtis Spencer. They were working together at the front of the train. Either one could have seen that a switch was misaligned in the direction they were heading. Barrett's "Explanation of Facts" states, "While on the head, both me and the conductor, protecting the shove[33] to SY2 and we fail to notice in time that the pocket switch was align (sic) against our movement. We tried to stop in time, but didn't make the stop in time." As a result, Barrett was terminated and Spencer was issued a written warning and then terminated for failing his post-accident drug screen. Barrett was a former Caliber employee and striker; Spencer was not.

Cowens testified as follows regarding the October 30 incident involving Jeffrey Williams: Williams was the utility person and Jemel Mims was the conductor. They were shoving or pushing 19 cars into a 19-car siding, and the last car ran through a switch at the far end. No one was at the far end of the shove, which was some 1800 feet from the engine. Although Mims states in his "Explanation of Facts" that he "was handling the situation but didn't realize that we have shoved back threw (sic) the west end switch at the time," Cowens determined that Williams was equally at fault because the utility man and conductor are supposed to work as a team and check each other. TNT's rules regarding switching procedure state, *inter alia*, as follows:

- The Conductor and Utility Man will stay together.
- The Conductor will plan and call all movements. The Utility man will need to ensure all the switches are lined up correctly and then double check everything.

Cowens testified that, "given Mr. Williams' experience doing the work, he should have indicated, "[H] ey, we need to watch the shove, either you or I, myself, need to call for a ride to the other end of the yard," so that either Mims or Williams could observe what was happing at that end of the train. Cowens stated that, "with his experience, Mr. Williams should have, in my mind, made the suggestion to a much more –greener railroader [Mims] that, hey, we need to watch this shove." In fact, Williams was not even present during the incident as he was at a different location preparing for the next move, believing that this move had been completed. As a result, both Williams and Mims were terminated. Williams was a former Caliber employee and striker; Mims was not.

Cowens testified as follows regarding the April 2, 2005 incident regarding Michael Shane White. White was the engineer on the crew. Kevin Harris, in training to become a rail supervisor, was filling in as the utility person. Harris was clearly at fault in running a switch when the train was headed in an easterly direction. Then, when the cars were uncoupled, the engineer, White, was instructed to head back west. At that point White should have noticed that the switch had been run through by noticing the misalignment and, in addition, the red target which indicates that the switch is aligned against the direction of the engine. White's failure to stop the train in time resulted in a derailment. Both Harris and White were terminated. White was a former Caliber employee and striker. Harris was not.

[33] A "shove" occurs when the engine is pushing the cars in front of it.

Cowens testified as follows regarding the June 13, 2005 incident regarding Roger Lara. Lara was the engineer on the crew. Lara was told to stop the train but cold not stop in time and ran through a switch. Cowens determined that Lara was operating the train too fast and would have been able to stop in time if the train was traveling at the correct rate of speed.

As noted above, Cowens was responsible for determining fault in the foregoing incidents, and for imposing any discipline. Insofar as I am able to discern, there seem to be no real disagreements regarding the facts underlying each occurrence. Rather, Cowens and the named employees simply differ as to the conclusions to be drawn from such facts. Cowens was subject to extensive cross-examination regarding each incident, and I conclude that his analysis contained no glaring omissions or obvious errors and was consistent with the facts as he reasonably construed them. Moreover, the record evidence indicates that former Caliber employees who engaged in the strike were not singled out for discharge for running switches. Thus, as noted above, significantly more non-Caliber employees who did not participate in the strike have been discharged within the applicable time frame for switch-running incidents. Nor does the complaint allege or the evidence show that non-Caliber employees were discriminatorily discharged or disciplined as a predicate for fabricating a rationale to discharge veteran employees. In this regard I am mindful of the record evidence, emphasized by the General Counsel and Union in their respective briefs, that following the strike TNT was out to get the veteran employees. Nevertheless, I credit Cowens and find that the four rail crew members were not discharged in violation of Section 8(a)(3) of the Act.

However, as noted above, the complaint also alleged that the four named employees were discharged in violation of Section 8(a)(5) of the Act because of TNT's conduct in failing to apply its progressive disciplinary procedure to switch-running incidents without prior bargaining with the Union. Thus, this constituted a unilateral change in the terms and conditions of employment of rail crew employees. Cowens admitted that despite the progressive discipline procedure that was put in place on July 3, which applied to all employees and did not make exception for rail crew members or switch-running incidents, TNT simply did not give rail crew employees the benefit of progressive discipline when they were deemed to be at fault in switch-running incidents.

Clearly, this constitutes a significant modification to the rail crew's terms and conditions of employment, for now rail crew employees could be terminated after the first infraction rather than the third infraction. *Toledo Blade Company, Inc.,* 343 NLRB No. 51 (2004), and cases cited therein. Nor has TNT demonstrated that it was precluded by the exigencies of the situation from negotiating with the Union before changing its disciplinary policy. *See RBE Electronics*, 320 NLRB 80 (1995).

Accordingly, I find that by unilaterally changing the disciplinary procedure pertaining to rail crew employees and by discharging rail crew employees pursuant to the unilaterally imposed rule, the Respondent has violated Section 8(a)(5) of the Act as alleged, and that the appropriate remedy for such unlawful conduct is a reinstatement and make whole remedy for those employees. *Boland Marine & Mfg. Co*., 225 NLRB 824 (1976), enfd. 562 F.2d 1259 (5th Cir. 1977).

However, it appears that the October 15 termination of Barrett, and the October 30 incident of Williams occurred during their probationary period with TNT as they participated in the strike from August 12 until they returned to work in October. Thus, according to the Seniority article (Article 17), of TNT's initial terms and conditions of employment, all new employees are subject to a 90 day probationary period, and there appears to be no exception for former Caliber employees. Article 17 states that "A new employee shall work under the

provisions of this Agreement but shall be employed on a ninety (90) day trial basis during which he/she may be released without further recourse `…" Accordingly, I find that Barrett and Williams were not discharged in violation of Section 8(a)(5) of the Act.

However, White, who was discharged on April 2, 2005, and Lara, who was discharged on June 13, 2005, had completed their 90 day probationary period after returning form the strike. I conclude, therefore, that by discharging White and Laura without affording them the benefit of the progressive disciplinary procedure set forth in TNT's initial terms and conditions of employment, TNT has violated Section 8(a)(5) of the Act as alleged.

5. Additional Section 8(a)(3) Allegations

(a) John Pritchett

John Pritchett was a former Caliber employee hired by TNT. He was a union steward and a member of the union's bargaining committee. As a union steward, prior to the strike, Pritchett spoke with Payroll/Human Resource Manager Sharon Smith a few times about difficulties he and other employees were having with the "KRONOS" time clock system TNT had instituted on July 3. The system required each employee to clock in and out with a plastic magnetically coded identification card. Each employee was issued such a card and was required to swipe it through a scanner; in this way employees' time and attendance would be recorded. After the strike Prichett learned TNT was refusing to recall him because he had allegedly clocked employees in on the scanner, an offense that apparently justifies immediate discharge as it is considered tantamount to theft or dishonesty. Pritchett denied that he did this.

Sharon Smith testified that on August 2, she happened to be looking out the office window overlooking the parking lot and observed an employee, whom she knew, coming to work five or 10 minutes late. The next day, while routinely checking the KRONOS printout, she was surprised to see that the timesheet listed that employee as having clocked in on time. This aroused her curiosity, and she looked at the videotape taken by the security camera that overlooked the time clock area. She observed that Pritchett had a number of time cards and was swiping them through the scanner. Then, she compared the time Pritchett timed in with the information on the printout showing that the employee and two other employees had been clocked in at the same time as Pritchett. She concluded that Pritchett had timed in himself and three other employees. Clearly this constituted a serious violation of company policy. She reported this to Todd Cox. Cox told her to talk to Cowens about the matter but, according to Smith, Cowens was preoccupied with other duties in the yard, and at that point was not spending much time in the office. Therefore she was not able to advise Cowens of the situation until August 11. Further, according to Smith, on August 11 the same thing occurred: thus, Pritchett timed in the same three employees whom Smith had observed coming to work late, and the printout reflected that all four employees had been timed in at the same time. On August 11 she was able to relate what had happened to Cowens, who also viewed the August 11 security tape.

Cowens' testimony is somewhat different. Cowens testified that he was made aware of the August 2 incident roughly a couple of days later, but did not investigate the incident or take any action at that point. Sometime after August 12 he did view the August 11 incident on the

security tape, and observed that Pritchett had swiped the scanner with several timecards. Cowens acknowledged that both swiping another employee's card and allowing another employee to swipe one's card are contrary to company policy, and that both employees are "equally as guilty." [34]

Then, apparently shortly after August 12, he discussed the situation with Cox and Smith, and it was decided that Pritchett would not be recalled to work after the strike because of this misconduct. After the strike the other three individuals involved were recalled to work with no disciplinary action taken against them. When asked why these three employees were not also terminated, Cowens replied, "There is no reason…we just *remembered* Pritchett doing the swiping of the other cards." (Italics supplied)

This explanation given by Cowens is suspect. Cowens testified that shortly after August 12, during the aforementioned meeting between Cowens, Cox and Smith, it was determined that Pritchett would not be recalled to work after the strike because of his misconduct. Therefore, this decision was made at a time when Pritchett and his co-conspirators, who were admittedly equally at fault, were under consideration for discipline. Accordingly, it is not possible that at this time only Pritchett's involvement was "remembered." Moreover, there was nothing to "remember," as the other employees had been identified as being involved; indeed, Smith had their printouts, and their involvement was documented.

Under the circumstances, in the absence of any other reasonable explanation, it appears that shortly after August 11 Cowens was willing to overlook the impermissible conduct of the three co-conspirators and singled out only Pritchett for discipline. The only difference between Pritchett and the other three employees, insofar as the record shows, is that Pritchett was visibly active on behalf of the Union as a union steward and member of the bargaining committee. Accordingly, I conclude that Pritchett was not offered his job back after the strike because of his activity on behalf of the Union. I therefore conclude he was terminated in violation of Section 8(a)(3) of the Act as alleged.

(b) Heather Ingram

Heather Ingram was initially hired by Adserv and began working for TNT on July 3 as a loader/unloader. She was trained by Carryne Hiser, a veteran employee. She was a good worker and got along with everybody, and was promoted to the position of transportation coordinator (TC). At that time the job of transportation coordinator was considered a supervisory position.[35]

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[34] I credit the testimony of Smith and Cowens and find that Pritchett did swipe other employees' timecards through the scanner on the dates indicated. Although the relevant security tapes were not preserved, I conclude that the explanations for TNT's failure to preserve the tapes were sufficiently explained by Smith and Cowens, and the absence of the tapes does not show, as argued by the General Counsel, that their testimony is fabricated.

[35] In fact it appears that this position was considered to be supervisory until sometime following the strike when TNT and the Union, after negotiations, agreed that it would be included within the bargaining unit. It was stipulated at the hearing that transportation coordinators are included within the bargaining unit, and TNT does not take the position in its brief that Ingram was a supervisor at the time of her discharge. Rather, she was not included within the bargaining unit at the time of her discharge because of her status as an Adserv employee.

Ingram worked through the strike, but was outwardly sympathetic and friendly toward the strikers, particularly Carryne Hiser, a visible and outspoken striker on the picket line, *infra.* Ingram would tell her crew members that she was continuing to have contact with Hiser. On September 21, during the strike, some of the strikers who were on her crew prior to the strike sent her a dozen yellow roses with an attached note. The flowers were delivered to the Adserv office on TNT's premises. The note said, "You do not need a special day to get flowers. Hang tough. We will be back soon." . She told her co-workers that the flowers were from her old union crew, and the flowers and note became a topic of conversation among Ingram's crew members. Ingram worked the next day, September 22, without incident. She was next scheduled to work on September 26.

Ingram testified that on September 26, Operations Manager Jensen Chance told her she was not living up to expectations and her services were no longer needed. He said he was supposed to have dismissed her on September 22 but did not have the opportunity to do so. Ingram asked him how she was not living up to expectations and, according to Ingram, "[H]e did not have no comeback except, I was supposed to catch you, on the 22nd."

Ingram testified that shortly after she became a transportation coordinator she received one verbal warning for allowing an employee to stand up on the back of her van. That was the only warning she ever received. However Ingram admitted that the production of her crew did decline while the Union was on strike. According to Ingram, "I was way under everybody….All the TC's all the other crews." Ingram explained this lack of production as the result of an overall decline in the volume of cars coming in to the facility during the strike. Therefore, she and her crew were assigned to do odd jobs such as cleaning and picking up nails in the yard. While, according to Ingram, no managers spoke to her about her low production statistics, Ingram also testified that production numbers, namely units per hour, would be announced over the radio, "Every few hours, every day. They would tell you how you were doing."

Cowens testified that Ingram was a temp employee hired by Adserv and was a probationary employee on Adserv's payroll at the time of her discharge. The transportation coordinator "runs the crew.," and Ingram was considered to be a management person. [36] Cowens testified that "[O]ver time her performance was…not up to par. It was even below standards of…what a brand new TC was doing and, also, her attitude went, from positive, to negative, in that she always had an excuse " for her crew's low production. Cowens testified that over the course of several weeks he discussed Ingram with Operations Manager Jensen Chance, and the two of them decided to dismiss her.[37]

Cowens testified that while working out in the yard he did overhear employees talking about the flowers Ingram received from her old union crew; however her receiving flowers from strikers had nothing to do with the decision to terminate her. Cowens further testified that Ingram was not demoted from TC to a loader/unloader position because once an employee agrees to accept a management position "we do not take steps backwards." Finally, Cowens

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[36] According to Cowens, who had worked for Caliber in a similar capacity, Ingram's position would have been one of a lead person under Caliber's policies, but TNT called the position transportation coordinator and assigned "more duties, in…inspecting, making sure that the job is carried out, in a quality manner," as distinguished from a lead person whose "sole purpose was to get 50 units and go home." A transportation coordinator, according to Cowens, was a member of management, who had the authority to write up a member of the crew for work infractions, and to recommend disciplinary action.

[37] At the time of the hearing Jensen Chance was no longer in the employ of TNT.

testified that Ingram's low production could not be attributed to a lack of vehicles at the facility, as there was always a large inventory of vehicles to be loaded and/or unloaded. Occasionally, a crew might be assigned some interim job such as to "go clean a fence" while rail cars were being positioned prior to being loaded; however, this would be a temporary assignment and would be taken into account for purposes of assessing the crew's productivity.

As noted above, Ingram, who was responsible for her crew's productivity, admitted that, "I was way under everybody….All the TC's all the other crews." I credit the testimony of Cowens, and find that the low productivity of Ingram's crew may not be attributed to lack of vehicles to be loaded or unloaded. Accordingly, I discount Ingram's testimony to the contrary, particularly as no witnesses corroborated Ingram's testimony to this effect. Accordingly, I conclude that Ingram's discharge was not violative of Section 8(a)(3)of the Act as alleged.

(c) Steve Murray

Steve Murray was a former Caliber employee. He was an active union adherent, a strike leader during the strike, a member of the Union's bargaining committee, and a union steward. On August 12, the day of the strike, he entered the premises to announce to the employees on duty that the strike was beginning and that the picket line had been established; he then invited them to walk out and join the strike.

Although Murray had "pointed out" under TNT's attendance policy prior to the strike, he was not discharged. Cowens testified that he had worked with Murray at the mixing center since 1996 for various predecessor employers including Caliber, that he liked Murray, and that Murray consistently missed a lot of work and did not seem to be real happy working for TNT. Nevertheless, Cowens tried to accommodate Murray's attendance problems. Further, TNT was attempting to negotiate a contract with the Union, and it was believed Murray's position as a union steward and member of the bargaining committee would complicate contract negotiations if Murray were terminated.

Cowens testified, and attendance records reflect, that Murray clocked in on August 9, but left the property without clocking out. This infraction constituted an unexcused absence of 6 points under the attendance policy. This attendance incident, coupled with Murray's prior attendance deficiencies, gave Murray a total point count of 291/2 points, well in excess of the permissible point count to justify his termination. Nevertheless he was not terminated. On August 11, Murray approached Cowens and said that his younger brother was having stomach surgery and that he needed to leave. Cowens told him that with proper documentation he could be excused. Murray did not return to work the next day, August 12, however, because the strike began that day. Cowens testified that shortly after August 12 it was decided to discharge Murray for failing to produce the proper documentation for his August 11 absence. In this regard, Cowens testified that if Murray had provided such proper documentation either during the strike or after the strike he "likely" would not have been discharged as Cowens continued to be "willing to work with Mr. Murray."

Murray testified that he did not recall any particular absences at all, that for some dates it was "false" that he did not clock in or out, that the time clock was not working properly on some occasions and he should not have received points under the attendance policy, and that he was never late for work. Regarding his unexcused absence for August 11, Murray testified that he received a phone call on his way to work that his brother was being taken to the hospital. He did not clock in but rather explained the situation to Cowens. Cowens said he

would excuse the absence as Murray's family came first, and told him not to worry about missing work. Murray asked whether he should clock in before he left, and Cowens said that Murray did not need to clock in and not to worry about it.

While I do not credit Murray, and find that in fact his attendance deficiencies were sufficient to warrant his discharge, I nevertheless conclude that his discharge was unlawful. As noted above, TNT committed numerous and serious unfair labor practices reflecting its hostility toward the Union and its intent to rid itself of veteran employees. Murray was perhaps the most active union adherent as well as a veteran employee. Unlike other employees, his extensive attendance deficiencies had been accommodated by Cowens prior to the strike both because Cowens liked him and because of his activities as a union steward and member of the Union's bargaining committee. Indeed, for these reasons, Cowens was willing to excuse Murray's August 11 absence and give Murray yet another chance.

However, as things transpired, Cowens did not give him another chance. Cowens testified he expected Murray to submit documentation for his August 11 absence either during the strike or following the strike. However Cowens also testified that Murray was terminated shortly after the strike began. This seems unreasonable and unnecessary and contrary to Cowens' testimony that such documentation could just as readily have been submitted upon Murray's return from the strike. Accordingly, it is clear that the decision to discharge Murray should have been deferred until Murray's first day of work following the strike in order to enable him to provide acceptable documentation for his August 11 absence. Yet after the strike TNT simply considered him to be discharged and refused to recall him. Under these circumstances, I find that TNT discharged Murray because of his participation in the strike rather than because of his attendance deficiencies. Accordingly, I find that Murray was discharged in violation of Section 8(a)(3) of the Act as alleged.

(d) Carryne Hiser

Carryne Hiser is a former Caliber employee. She was employed by TNT as a loader/unloader. Prior to the strike she was asked by two supervisors to become a transportation coordinator (TC). She asked if the position of TC was a union job and she was told it was a management position. Therefore she declined because she was unwilling to accept a non-union position. Cox later asked her to become a TC, and on this occasion she again refused the position. Hiser participated in the strike, served picket duty, and, while on the picket line videotaped employees entering the facility to document that the reserved gates established by TNT were being compromised. Cox observed Hiser's videotaping activities and asked her to put her camcorder away and quit videotaping. She complied because she respected Cox as her employer and knew that eventually she would be returning to work after the strike. On several occasions during the strike Cox phoned her on her cell phone and asked her to return to work. She refused, and told him he just did not understand her commitment to the Union. While on the picket line she also had conversations with Operations Manger Jensen Chance and Supervisor Brian Hockenbury.

On October 3, after the strike, Hiser returned to work. Supervisor Hockenbury again asked her to become a TC because "she knew what she was doing," and again she refused. On October 5, Hockenbury said he had a write-up for her and another employee, Kenneth Capeland, for substandard work, namely for improperly chocking and spacing vehicles on rail cars. Chocking is the placing of chocks or restraints behind the wheels of vehicles so they will remain secure and not move during transit. Spacing is the amount of space between vehicles so that the vehicles will be the appropriate distance from each other on the rail cars. After receiving the write-up Hiser explained to Hockenbury that she didn't do that kind of work, that the work for

which she had been reprimanded was not her work, and that Hockenbury knew it wasn't her work. She explained that vehicles were not necessarily chocked by the same crew member who drove the vehicle on to the rail car, and therefore the chocking of a particular vehicle could not be attributed to any particular crew member.

Then she talked to Preston, her TC at that time, and told him what she had told Hockenbury, namely that the vehicles were not necessarily chocked by the crew member who drove the vehicle on to the rail car, and therefore she should not have been given a write-up. Preston disagreed, and said, "No, I told everybody to chock their own stuff." Hiser said that's not how they had been doing it, and all the crew, who were present during this conversation, agreed that Hiser was correct. Because of this write-up Hiser believed that TNT was attempting to contrive a way to discharge her as a result of her union activities. Therefore, she asked her crew members to double check her chalking and spacing in the event she needed witnesses to attest to the fact that her work was satisfactory.

Hiser at first testified she had never been told on October 5 by Preston that TNT wanted each crew member to chalk his or her own work so that individual responsibility could be assessed should there be a problem. However, when confronted with her affidavit, Hiser admitted that at the start of the shift Preston said that from then on each individual had to chalk his or her own vehicles. As noted, Hiser had other crew members rechecking her work to make sure that the chalks were secure and the spacing was correct as they walked by her vehicles. Hiser testified that the rechecking of her work did not slow down the production of the crew, as crew members who were already on the rail cars with their own vehicles simply would walk by her vehicles and kick the chalks, which would come off or move if they were not secure.

At about 4:30 p.m. on that day, October 5, Hiser and Capeland were summoned to the main office. Project Manger Cox and Supervisor Hockenbury were present. Cox said, according to Hiser, that her chocking and spacing was unacceptable as TNT ultimately paid for vehicles that were damaged in transit due to being improperly positioned and secured on the rail cars. Cox asked for Hockenbury's recommendation regarding discipline, and Hockenbury suggested that Hiser be "retrained." Again, Hiser repeated that Cox knew the work for which she had been written up was not her work as she knew better than to do that kind of work.

Hiser worked the rest of that day. On the following day, October 6, she and Lisa Spears, a non-striker, were asked by Ed, a supervisor to come check some work they had done "because chocks were missing and stuff." They looked at the vehicles noted on the log and there was nothing wrong with Hiser's chocks. Ed agreed and said he had apparently written down the wrong identification numbers. Spears' mistakes were fixed. Later that day at the end of her shift, Operations Manager Chance came over the radio and told Preston to send Hiser to the offices on the third floor. Preston did so, telling her, "Well, it was not a good thing." She was terminated. In the office, according to Hiser, Chance never directly faced her and just gave her a termination slip saying she was terminated for substandard work. He gave her no explanation of what the substandard work was supposed to be.

Employee Travis Schwab was on Hiser's crew. Schwab testified that he and others would check Hiser's chalks, but that this did not delay the crew because other crew members who "weren't real fast at it" would not have completed their work by the time Hiser's chalks had been checked. The crew worked as a group and once they had completed loading their vehicles they would be transported in a van to get other vehicles and repeat the process. In this manner, the entire crew waited until the work of all the crew members had been completed.

As noted, Operations Manager Chance was not employed by TNT at the time of the hearing and did not testify. Nor did Preston or Hockenbury testify. Cox testified, "I can't talk to exactly what she did or didn't do out in the yard…" Cox admitted he did not know the details of any substandard work Hiser allegedly performed. Cox testified that in the event a worker's chocks were not secure, Hockenbury "would probably have to speak to that directly, but it's typical that they would go out and show them again how to chalk (sic)."

Hiser was known by Cox and other managers and supervisors to be an active and outspoken union adherent. Further, as noted, it is clear that TNT was reluctant to take back returning strikers and was attempting to cause them to decline recall by imposing discriminatory recall conditions. Hiser was never "retrained," as Supervisor Hockenbury recommended. Rather, she was summarily discharged without being given an explanation for her alleged substandard work. Clearly, Hiser followed instructions by doing her own chalking after being told to do so. Insofar as the limited record evidence indicates, having other crew member check her work did not delay the work of the crew. Further, if indeed this were the case, it would have been a simple matter for the TC or supervisor to instruct Hiser and other crew members not to check the work of others. As noted, TNT has failed to provide any evidence setting forth precisely why Hiser was discharged, and the argument that Hiser was discharged for having other crew members check her work is simply not substantiated by the evidence. Thus Cox, the only TNT witness who testified about Hiser, did not know why Hiser was discharged.

Accordingly, on the basis of the foregoing, I find that Hiser was discharged in violation of Section 8(a)(3) of the Act as alleged.

(e) Laura Barksdale

Laura Barksdale was a former Caliber employee. She began working for TNT on about July 11 as a scanner, and participated in the strike beginning August 12. She was recalled to work after the strike on about October 11, and worked until December 30, when she was discharged for failing to successfully complete her probationary period. [38] However, the Respondent agreed in this proceeding that it was unlawful to have required the returning strikers, including Barksdale, to serve a new 90-day probationary period, and since Barksdale had been discharged for not successfully completing her new, unlawfully imposed, 90-day probationary period she was offered and accepted reinstatement in settlement of this allegation of the complaint.

She returned to work again on April 11, 2005. However, upon her return to work she faced the same new working conditions that were imposed upon all scanners, namely, that they would have to walk substantial distances in the performance of their work, and would no longer be provided vehicles to move about the facility. Further, because of this they were no longer permitted to wear casual or tennis-type shoes, but were required to wear work boots. As part of the settlement agreement in this proceeding the Respondent agreed to post a notice which states, inter *alia*, "We have, upon the Union's request, bargained in good faith with the Union regarding… use of vans, gloves, goggles and boots by Scanners."

On April 11, Barksdale was given a week to purchase and begin wearing boots in the performance of her duties. After her first week back on the job she did begin wearing boots, and developed blisters and related problems because of the chafing. On April 23 she left work early because her feet were hurting. On the following day, April 24, she was terminated for

[38] The record does not reflect the reasons for the Respondent's action in this regard.

pointing out due to the fact that the attendance points she had accumulated during her initial recall to work after the strike, together with the attendance points she received as a result of leaving work early on April 24, put her over the limit.

I have previously found that TNT's initial terms of employment lawfully contained a no-fault attendance policy. The General Counsel does not contend that Barksdale's attendance points were insufficient to warrant her discharge under the policy. Rather, it is contended that Barksdale, as a former Caliber veteran and striker, was discriminatorily discharged.

The evidence shows that Barksdale was given a week to purchase and begin wearing boots at work after her April 11 reinstatement. This new safety-related requirement was apparently deemed to be acceptable by the Union. Further, a week seems like an adequate period of time to permit employees to purchase and accommodate themselves to the wearing of boots. Apparently Barksdale procrastinated and did not purchase the boots until about April 18, and therefore had no time to break them in before she started wearing them at work. This resulted in considerable discomfort and caused her to leave work early on April 23, as a result of which she pointed out under the no-fault attendance policy. Under the circumstances, I do not find the discharge of Barksdale was discriminatorily motivated. Accordingly, I find that Barksdale was not discharged in violation of Section 8(a)(3) of the Act as alleged, and I shall dismiss this allegation of the complaint.

(f) Alfred Miller

Alfred Miller, a former Caliber employee, began working for TNT on about July 3. He participated in the strike and returned to work on October 10. Miller testified that on the morning of October 18, before he could enter the facility to clock in, he was told by an unidentified individual that he was no longer needed. He asked whether he was being terminated, and was told "basically yes." Therefore he did not return to work. Miller was unable to identify the individual who spoke to him, stating that the individual was among a group of people whom he did not know. However, Miller believed the individual who spoke to him was a member of management, as he had seen several of the individuals in the group, including the individual who spoke to him, standing on the office balcony where TNT's offices and managers were located.

Payroll Manger Sharon Smith testified that according to TNT's records, Miller called in on October 18 and said he would not be at work. Curiously, for some reason, Miller specifically insisted that his supervisor, Don Hensley, be apprised of the fact that Miller had no reason for his absence, and Smith duly noted this. On the next day, October 19, according to Smith, Miller did not call in and therefore was considered a no call/no show. On October 20, he was also a no call/no show, and was therefore terminated. Smith testified that Miller could not have been terminated by some unidentified manager at the gate before he clocked in, as it has never happened that TNT has ever terminated employees in this manner. Smith also testified that had Miller brought in documentation, such as a medical slip, showing acceptable reasons for his absences, he would have been given the benefit of the doubt and the absences would have been considered excused absences under the attendance policy.

I credit the testimony of Smith, and find that Miller was not discharged in violation of Section 8(a)(3) of the Act as alleged.

6. Adserv Violations

As noted, the complaints allege that TNT and Adserv, an employment agency, are joint employers. The record indicates that Adserv no longer has a presence at the mixing yard facility, and is no longer performing any work to supply employees to TNT. The formal papers in this matter, including the affidavits of service and signed postal service delivery receipts accompanying the complaints, reflect that Adserv was properly served. Adserv failed to file an answer to the complaints, and therefore I conclude that Adserv has violated the Act as alleged in the complaints, as follows.[39]

> Paragraph 8: Respondent TNT and Respondent Adserv, by the individuals named below, at the mixing center, and on or about the dates shown, coerced and encouraged employees to support a petition to decertify the Union as the exclusive collective bargaining representative of the Unit.
>
> Paragraph 9(a) Since at least early November 2004, Respondent TNT and Respondent Adserv have maintained and, by and through the Adserv agents, have informed employees of its policy of not hiring employees of Caliber, the predecessor employer of Respondent TNT.
>
> Paragraph 9(b) In or around mid-August, 2004…Respondent Adserv, by Andrea Altis, told employees that they were terminated because they had honored a strike against Respondent TNT.
>
> Paragraph 9(c) On or about November 18, 2004, Respondent Adserv, by a named agent of Respondent Adserv, told employees that they would not be hired because they had honored a strike against Respondent TNT.
>
> Paragraph 21(a) In or around mid-August, 2004, a more precise date being presently unknown to the General Counsel, Respondent Adserv terminated employee Angelica Lopez.
>
> Paragraph 21(b) On or about November 20, 2004, Respondent Adserv refused to reinstate Ronald Farrell.
>
> Paragraph 21 (c) Respondent Adserv and Respondent TNT, as joint employers, engaged in the conduct described in paragraph 21(a) and (b) because the named employees of Respondent Adserv supported and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

On the basis of the foregoing, I find that Adserv has violated Section 8(a)(1) and (3) of the Act as alleged in the complaint.

Conclusions of Law

1. Respondent TNT and Respondent Adserv are employers engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

[39] See *TNT Logistics North America, Inc.*, 344 NLRB No. 61 (2005).

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent TNT has violated and is violating Section 8(a)(1), (3) and (5) of the Act as found herein.

4. Respondent Adserv has violated and is violating Section 8(a)(1) and (3) of the Act as alleged in the complaint.

The Remedy

Having found that Respondent TNT has violated and is violating Section 8(a)(1), (3) and (5) of the Act as by failing to hire applicants for employment, by constructively discharging employees, and by discharging employees for other reasons in violation of Section 8(a)(3) or Section 8(a)(5) of the Act, I recommend that Respondent TNT be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I further recommend that the named employees be made whole for any loss of earnings or other benefits they may have suffered, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent Adserv has violated and is violating Section 8(a)(1) and (3) of the Act by coercing and encouraging employees to support a petition to decertify the Union, by informing employees of its policy of not hiring employees of Caliber, the predecessor employer of Respondent TNT, by telling employees that they were terminated because they had honored a strike against Respondent TNT, by telling employees that they would not be hired because they had honored a strike against Respondent TNT, and by terminating an employee and refusing to reinstate an employee, I recommend that Respondent Adserv be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I further recommend that the named employees be made whole for any loss of earnings or other benefits they may have suffered, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend the posting of an appropriate notices by both Respondent TNT ("Appendix 1") and Respondent Adserv, ("Appendix 2") attached hereto

ORDER[40]

The Respondent TNT, its officers, agents, successors, and assigns, shall:

1.Cease and desist from:

[40] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Failing and refusing to hire applicants for employment for because of their activities on behalf of the Union.

(b) Constructively discharging employees because of their activities on behalf of the Union.

(c) Discharging employees because of their activities on behalf of the Union.

(d) Failing to follow the established progressive disciplinary procedure for discharging employees without first bargaining with the Union over such changes.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Within 14 days from the date of this Order, offer employment and/or reinstatement to those employees who were discharged or denied employment for discriminatory reasons, and make them whole in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, offer reinstatement to those employees who were discharged as a result of TNT's failure to follow the established progressive disciplinary procedure without first bargaining with the Union over such changes, and make them whole in the manner set forth in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix 1."[41] Copies of the notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Regional Office, file with the Regional Director for Region 17 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[41] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

The Respondent Adserv, its officers, agents, successors, and assigns, shall:

1.Cease and desist from:

(a) Coercing and encouraging employees to support a petition to decertify the Union as the employees exclusive collective bargaining representative.

(b) Informing employees of a policy to not hire former employees of Caliber.

(c) Advising employees that they were terminated because they had honored a strike against TNT.

(d) Advising employees that they would not be hired because they had honored a strike against Respondent TNT.

(e) Terminating employees for discriminatory reasons.

(f) Refusing to reinstate employees for discriminatory reasons.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Within 14 days from the date of this Order, offer employment and/or reinstatement to those employees who were discharged or denied reinstatement employment for discriminatory reasons, and make them whole in the manner set forth in the remedy section of this decision.

(b) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix 2."[42] Copies of the notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[42] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

(c) Within 21 days after service by the Regional Office, file with the Regional Director for Region 17 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 1, 2006.

Gerald A. Wacknov
Administrative Law Judge

APPENDIX 1

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT Fail and refuse to hire applicants for employment because of their activities on behalf of International Brotherhood of Teamsters, Local Union 41.

WE WILL NOT discharge or constructively discharge employees because of their activities on behalf of the Union.

WE WILL NOT fail to follow the established progressive disciplinary procedure for discharging employees without first bargaining with the Union over such changes.

WE WILL offer the following employees immediate reinstatement to their former positions and we will pay them backpay and make them whole, with interest, for any loss of earnings and other benefits they may have suffered because of their unlawful discharge or our unlawful failure to offer them reinstatement and/or employment:

Jonathan Foster
Mathew Daughtry
Danny Barnes
Timothy Mitchell
Aaron Spring
Greg Steele
Marvin Rowlett
Josh Ballinger
Robert Barksdale
Tony Essig
Harry Goodloe
Ken Hulett
Jennifer Calvert
Linda Fisher
Ryan Fisher
Suni Frese
Carlo Lopez,
Jacqueline Mayes
Sean Scott
M. Shane White
Roger Lara
John Pritchett,
Steve Murray
Carryne Hiser

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the foregoing rights guaranteed under Section 7 of the Act.

TNT LOGISTICS NORTH AMERICA, INC.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

8600 Farley Street, Suite 100

Overland Park, Kansas 66212-4677

Hours: 8:15 a.m. to 4:45 p.m.

913-967-3000.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 913-967-3005.

APPENDIX 2

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coerce and encourage employees to support a petition to decertify the Union as the employees' exclusive collective bargaining representative.

WE WILL NOT inform employees of a policy to not hire former employees of Caliber.

WE WILL NOT tell employees that they were terminated because they had honored a strike against TNT.

WE WILL NOT advise employees that they would not be hired because they honored a strike against Respondent TNT.

WE WILL NOT terminate employees for discriminatory because of their activities on behalf of the Union.

WE WILL NOT refuse to reinstate employees for discriminatory reasons.

WE WILL offer the following employees immediate reinstatement to their former positions and we will pay them backpay and make them whole, with interest, for any loss of earnings and other benefits they may have suffered because of their unlawful discharge or our unlawful failure to offer them reinstatement and/or employment:

Angelica Lopez
Ronald Farrell

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

ADSERV TEAM, INC.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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